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6 WELLS FARGO BANK, N.A. (erroneously sued herein as  
WELLS FARGO & COMPANY)  
7

8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA -- OAKLAND DIVISION  
10

11 MONTE RUSSELL, on behalf of  
himself and others similarly situated,

12 Plaintiff,

13 v.

14 WELLS FARGO & COMPANY,

15 Defendants.  
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CASE NO. C 07-03993 CW

JUDGE CLAUDIA WILKEN  
COURTROOM 2

**DEFENDANT WELLS FARGO BANK,  
N.A.'S OBJECTIONS TO EVIDENCE  
RELIED UPON BY PLAINTIFF IN  
MOTION FOR CONDITIONAL  
COLLECTIVE ACTION  
CERTIFICATION UNDER FLSA, 29  
U.S.C. § 216(b), AND FOR COURT-  
APPROVED NOTICE OF FLSA  
CLAIMS**

Hearing Date: September 4, 2008  
Time: 2:00 p.m.  
Location: Courtroom 2

1 **I. PRELIMINARY STATEMENT**

2 Defendant Wells Fargo Bank, N.A. (hereinafter, "Wells Fargo") hereby  
3 respectfully submits its objections to the evidence submitted by Plaintiff Monte Russell  
4 (hereinafter, "Plaintiff") in support of Plaintiff's Motion for Conditional Collective Action  
5 Certification. The evidence offered by Plaintiff in support of his Motion that is the subject  
6 of these objections is the six declarations of Monte Russell, Greg Weir, Richard Chow,  
7 Peter Kennedy, Daniel Friedman, and Greg Diersing. The six declarations are  
8 substantially similar to each other and largely contain conclusory statements based on  
9 hearsay and speculation.

10 For the reasons set forth below, Wells Fargo's objections should be sustained.

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12 **II. SPECIFIC EVIDENTIARY OBJECTIONS**

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14 **A. Declaration of Monte Russell**

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16 **Objection No. 1:** Paragraph 5, p. 1-2, which states: "During my tenure as a PC/LAN  
17 Engineer 3 in Wells Fargo's Technology Information Group, I learned that Wells Fargo  
18 had classified my position and other similar Technology Information Group positions as  
19 'exempt' from entitlement to overtime compensation. I knew many other employees who  
20 held the position title PC/LAN Engineer 3 during my employment with Wells Fargo and  
21 none of them were paid overtime during the time I was employed by Wells Fargo."

22 **Grounds for Objection No. 1:** This statement lacks foundation and is impermissibly  
23 conclusory. The declaration does not state how he "learned" that other positions were  
24 classified as "exempt" or how he knew that other employees were not paid overtime,  
25 which is information entirely within his personal knowledge. See Fed. R. Evid. 602. The  
26 statements also are inadmissible hearsay. See Fed. R. Evid. 802. These are out of court  
27 statements purportedly made by other PC/LAN Engineer 3's offered to prove the truth of  
28 the matter asserted, i.e., that other employees were classified as exempt and that they were

1 not paid overtime.

2 **Ruling on Objection No. 1:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

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4 **Objection No. 2:** Paragraph 6, p. 2, which states: “I knew of and had discussions with  
5 other PC/LAN Engineers 3 at Wells Fargo’s other locations, including Minnesota,  
6 California, and Texas. Based upon my training, experience, and discussions with other  
7 employees, I can attest that the work of PC/LAN Engineers 3 was functionally the same  
8 and did not vary significantly from location to location.”

9 **Grounds for Objection No. 2:** This statement lacks foundation and is impermissibly  
10 conclusory. See Fed. R. Evid. 602, 701. The statements also are inadmissible hearsay.  
11 See Fed. R. Evid. 802. These are out of court statements purportedly made by other  
12 PC/LAN Engineer 3’s offered to prove the truth of the matter asserted, i.e., that other  
13 employees performed the same duties as he performed.

14 **Ruling on Objection No. 2:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

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16 **Objection No. 3:** Paragraph 7, p. 2, which states: “As a PC/LAN Engineer 3, the  
17 primary work I performed was highly structured and constrained by Wells Fargo’s  
18 predetermined instructions, specifications, policies, and procedures, and did not normally  
19 require the consistent exercise of discretion and independent judgment.”

20 **Grounds for Objection No. 3:** This statement lacks foundation and is impermissibly  
21 conclusory. The declaration provides legal conclusions without any specificity, which is  
22 information entirely within his personal knowledge. See Fed. R. Evid. 602, 701.

23 **Ruling on Objection No. 3:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

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25 **Objection No. 4:** Paragraph 8, p. 2-3, which states: “During my employment with Wells  
26 Fargo, I came to know other employees with position titles PC/LAN Engineer 3, 4, and 5  
27 located at Wells Fargo’s various locations in the United States. Based upon my training,  
28 experience, and discussions with other employees, I can attest that the work of PC/LAN

1 Engineers 3, 4, and 5 was functionally the same and did not vary significantly from  
2 location to location. PC/LAN Engineers 4 and 5 had primary duties similar to the duties  
3 of a PC/LAN Engineer 3, as set forth above. The primary work of PC/LAN Engineers 4  
4 and 5 was also highly structured and constrained by Wells Fargo's predetermined  
5 instructions, specifications, policies, and procedures, and did not normally require  
6 consistent exercise of discretion and independent judgment."

7 **Grounds for Objection No. 4:** This statement lacks foundation and is impermissibly  
8 conclusory. The declaration does not state how he learned that individuals in other  
9 positions performed the same work as he performed, information entirely within his  
10 personal knowledge. Furthermore, the statement contains legal conclusions, without any  
11 specificity. See Fed. R. Evid. 602, 701. The statements also are inadmissible hearsay.  
12 See Fed. R. Evid. 802. These are out of court statements purportedly made by PC/LAN  
13 Engineer 4's and 5's offered to prove the truth of the matter asserted, i.e., that other  
14 employees performed the same work as he did in the same manner.

15 **Ruling on Objection No. 4:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_  
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17 **Objection No. 5:** Paragraph 9, p. 3, which states: "At no point in time during my  
18 employment with Wells Fargo did I have a clear understanding that I would be paid based  
19 on a so-called 'fluctuating workweek' method of calculating overtime compensation."

20 **Grounds for Objection No. 5:** This statement is irrelevant and therefore inadmissible.  
21 See Fed. R. Evid. 402. It is irrelevant to the inquiry of whether the "fluctuating  
22 workweek" method is the proper calculation of back pay to an allegedly misclassified  
23 employee whether the employee had an understanding that he would be compensated  
24 based on a "fluctuating workweek" calculation. See, e.g., Tumulty v. Fedex Ground  
25 Package Sys., Inc., 2005 WL 1979104, \*4 (W.D. Wash. Aug. 16, 2005) ("[t]he First and  
26 Fifth Circuits have both held that employers who inappropriately misclassified an  
27 employee as exempt from the FLSA may rely on § 778.114 [which allows the fluctuating  
28 workweek calculation] to determine overtime due because the employees understood that

they would be paid a fixed weekly salary regardless of the hours worked”) (citing Valerio v. Putnam Assoc. Inc., 173 F.3d 35, 39-40 (1st. Cir. 1999) and Blackmon v. Brookshire Grocery Co., 835 F.2d 1135, 1138 (5th Cir. 1988)).

**Ruling on Objection No. 5:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

**B. Declaration of Greg Weir**

**Objection No. 6:** Paragraph 5, p. 1-2, which states: “During my tenure as a PC/LAN Engineer 4 in Wells Fargo’s Technology Information Group, I learned that Wells Fargo had classified my position and other similar Technology Information Group positions as ‘exempt’ from entitlement to overtime compensation. I knew many other employees who held the position title PC/LAN Engineer 4 during my employment with Wells Fargo and none of them were paid overtime during the time I was employed by Wells Fargo.”

**Grounds for Objection No. 6:** This statement lacks foundation and is impermissibly conclusory. The declaration does not state how he “learned” that other positions were classified as “exempt” or how he knew that other employees were not paid overtime, which is information entirely within his personal knowledge. See Fed. R. Evid. 602. The statements also are inadmissible hearsay. See Fed. R. Evid. 802. These are out of court statements purportedly made by other PC/LAN Engineer 4’s offered to prove the truth of the matter asserted, i.e., that other employees were classified as exempt and that they were not paid overtime.

**Ruling on Objection No. 6:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

**Objection No. 7:** Paragraph 6, p. 2, which states: “I knew of and had discussions with other PC/LAN Engineers 4 at Wells Fargo’s other locations, including Minnesota, California, and Arizona. Based upon my training, experience, and discussions with other employees, I can attest that the primary work of PC/LAN Engineers 4 was functionally the same and did not vary significantly from location to location.”

1 **Grounds for Objection No. 7:** This statement lacks foundation and is impermissibly  
2 conclusory. See Fed. R. Evid. 602, 701. The statements also are inadmissible hearsay.  
3 See Fed. R. Evid. 802. These are out of court statements purportedly made by other  
4 PC/LAN Engineer 4's offered to prove the truth of the matter asserted, i.e., that other  
5 employees performed the same duties as he performed.

6 **Ruling on Objection No. 7:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_  
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8 **Objection No. 8:** Paragraph 7, p. 2, which states: "As a PC/LAN Engineer 4, the  
9 primary work I performed was highly structured and constrained by Wells Fargo's  
10 predetermined instructions, specifications, policies, and procedures, and did not normally  
11 require the consistent exercise of discretion and independent judgment."

12 **Grounds for Objection No. 8:** This statement lacks foundation and is impermissibly  
13 conclusory. The declaration provides legal conclusions without any specificity, which is  
14 information entirely within his personal knowledge. See Fed. R. Evid. 602, 701.

15 **Ruling on Objection No. 8:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_  
16

17 **Objection No. 9:** Paragraph 8, p. 2-3, which states: "During my time working for Wells  
18 Fargo, I came to know other employees with position titles PC/LAN Engineer 3, 4, and 5  
19 located at Wells Fargo's various locations in the United States. Based upon my training,  
20 experience, and discussions with other employees, I can attest that the work of PC/LAN  
21 Engineers 3, 4, and 5 was functionally the same and did not vary significantly from  
22 location to location. PC/LAN Engineers 3 and 5 had primary duties similar to the duties  
23 of a PC/LAN Engineer 4, as set forth above. The primary work of PC/LAN Engineers 3  
24 and 5 was also highly structured and constrained by Wells Fargo's predetermined  
25 instructions, specifications, policies, and procedures, and did not normally require  
26 consistent exercise of discretion and independent judgment."

27 **Grounds for Objection No. 9:** This statement lacks foundation and is impermissibly  
28 conclusory. The declaration does not state how he learned that individuals in other

positions performed the same work as he performed, information entirely within his personal knowledge. Furthermore, the statement contains legal conclusions, without any specificity. See Fed. R. Evid. 602, 701. The statements also are inadmissible hearsay. See Fed. R. Evid. 802. These are out of court statements purportedly made by PC/LAN Engineer 3's and 5's offered to prove the truth of the matter asserted, i.e., that other employees performed the same work as he did in the same manner.

**Ruling on Objection No. 9:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

**Objection No. 10:** Paragraph 9, p. 3, which states: "At no point in time during my employment with Wells Fargo did I have a clear understanding that I would be paid based on a so-called 'fluctuating workweek' method of calculating overtime compensation."

**Grounds for Objection No. 10:** This statement is irrelevant and therefore inadmissible. See Fed. R. Evid. 402. It is irrelevant to the inquiry of whether the "fluctuating workweek" method is the proper calculation of back pay to an allegedly misclassified employee whether the employee had an understanding that he would be compensated based on a "fluctuating workweek" calculation. See, e.g., Tumulty v. Fedex Ground Package Sys., Inc., 2005 WL 1979104, \*4 (W.D. Wash. Aug. 16, 2005) ("[t]he First and Fifth Circuits have both held that employers who inappropriately misclassified an employee as exempt from the FLSA may rely on § 778.114 [which allows the fluctuating workweek calculation] to determine overtime due because the employees understood that they would be paid a fixed weekly salary regardless of the hours worked") (citing Valerio v. Putnam Assoc. Inc., 173 F.3d 35, 39-40 (1st. Cir. 1999) and Blackmon v. Brookshire Grocery Co., 835 F.2d 1135, 1138 (5th Cir. 1988)).

**Ruling on Objection No. 10:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_



1           **C. Declaration of Richard Chow**

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3       **Objection No. 11:** Paragraph 5, p. 1-2, which states: “During my tenure as a PC/LAN  
4 Engineer 3 in Wells Fargo’s Technology Information Group, I learned that Wells Fargo  
5 had classified my position and other similar Technology Information Group positions as  
6 ‘exempt’ from entitlement to overtime compensation. I knew many other employees who  
7 held the position title PC/LAN Engineer 3 during my employment with Wells Fargo and  
8 none of them were paid overtime during the time I was employed by Wells Fargo.”

9       **Grounds for Objection No. 11:** This statement lacks foundation and is impermissibly  
10 conclusory. The declaration does not state how he “learned” that other positions were  
11 classified as “exempt” or how he knew that other employees were not paid overtime,  
12 which is information entirely within his personal knowledge. See Fed. R. Evid. 602. The  
13 statements also are inadmissible hearsay. See Fed. R. Evid. 802. These are out of court  
14 statements purportedly made by other PC/LAN Engineer 3’s offered to prove the truth of  
15 the matter asserted, i.e., that other employees were classified as exempt and that they were  
16 not paid overtime.

17       **Ruling on Objection No. 11:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

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19       **Objection No. 12:** Paragraph 6, p. 2, which states: “I knew of and had discussions with  
20 other PC/LAN Engineers 3 at Wells Fargo’s other locations, including Minnesota and  
21 Wisconsin. Based upon my training, experience, and discussions with other employees, I  
22 can attest that the work of PC/LAN Engineers 3 was functionally the same and did not  
23 vary significantly from location to location.”

24       **Grounds for Objection No. 12:** This statement lacks foundation and is impermissibly  
25 conclusory. See Fed. R. Evid. 602, 701. The statements also are inadmissible hearsay.  
26 See Fed. R. Evid. 802. These are out of court statements purportedly made by other  
27 PC/LAN Engineer 3’s offered to prove the truth of the matter asserted, i.e., that other  
28 employees performed the same duties as he performed.



1 **Ruling on Objection No. 12:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

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3 **Objection No. 13:** Paragraph 7, p. 2, which states: “As a PC/LAN Engineer 3, the  
4 primary work I performed was highly structured and constrained by Wells Fargo’s  
5 predetermined instructions, specifications, policies, and procedures, and did not normally  
6 require the consistent exercise of discretion and independent judgment.”

7 **Grounds for Objection No. 13:** This statement lacks foundation and is impermissibly  
8 conclusory. The declaration provides legal conclusions without any specificity, which is  
9 information entirely within his personal knowledge. See Fed. R. Evid. 602, 701.

10 **Ruling on Objection No. 13:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

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12 **Objection No. 14:** Paragraph 8, p. 2-3, which states: “During my employment with  
13 Wells Fargo, I came to know other employees with position titles PC/LAN Engineer 3, 4,  
14 and 5 located at Wells Fargo’s various locations in the United States. Based upon my  
15 training, experience, and discussions with other employees, I can attest that the work of  
16 PC/LAN Engineers 3, 4, and 5 was functionally the same and did not vary significantly  
17 from location to location. PC/LAN Engineers 4 and 5 had primary duties similar to the  
18 duties of a PC/LAN Engineer 3, as set forth above. The primary work of PC/LAN  
19 Engineers 4 and 5 was also highly structured and constrained by Wells Fargo’s  
20 predetermined instructions, specifications, policies, and procedures, and did not normally  
21 require consistent exercise of discretion and independent judgment.”

22 **Grounds for Objection No. 14:** This statement lacks foundation and is impermissibly  
23 conclusory. The declaration does not state how he learned that individuals in other  
24 positions performed the same work as he performed, information entirely within his  
25 personal knowledge. Furthermore, the statement contains legal conclusions, without any  
26 specificity. See Fed. R. Evid. 602, 701. The statements also are inadmissible hearsay.  
27 See Fed. R. Evid. 802. These are out of court statements purportedly made by PC/LAN  
28 Engineer 4’s and 5’s offered to prove the truth of the matter asserted, i.e., that other

employees performed the same work as he did in the same manner.

**Ruling on Objection No. 14:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

**Objection No. 15:** Paragraph 9, p. 3, which states: “At no point in time during my employment with Wells Fargo did I have a clear understanding that I would be paid based on a so-called ‘fluctuating workweek’ method of calculating overtime compensation.”

**Grounds for Objection No. 15:** This statement is irrelevant and therefore inadmissible.

See Fed. R. Evid. 402. It is irrelevant to the inquiry of whether the “fluctuating workweek” method is the proper calculation of back pay to an allegedly misclassified employee whether the employee had an understanding that he would be compensated based on a “fluctuating workweek” calculation. See, e.g., Tumulty v. Fedex Ground Package Sys., Inc., 2005 WL 1979104, \*4 (W.D. Wash. Aug. 16, 2005) (“[t]he First and Fifth Circuits have both held that employers who inappropriately misclassified an employee as exempt from the FLSA may rely on § 778.114 [which allows the fluctuating workweek calculation] to determine overtime due because the employees understood that they would be paid a fixed weekly salary regardless of the hours worked”) (citing Valerio v. Putnam Assoc. Inc., 173 F.3d 35, 39-40 (1st. Cir. 1999) and Blackmon v. Brookshire Grocery Co., 835 F.2d 1135, 1138 (5th Cir. 1988)).

**Ruling on Objection No. 15:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

#### **D. Declaration of Peter Kennedy**

**Objection No. 16:** Paragraph 5, p. 1-2, which states: “During my tenure as a PC/LAN Engineer 3 in Wells Fargo’s Technology Information Group, I learned that Wells Fargo had classified my position and other similar Technology Information Group positions as ‘exempt’ from entitlement to overtime compensation. I knew many other employees who held the position title PC/LAN Engineer 3 and none of them were paid overtime during the time I was employed by Wells Fargo.”

**Grounds for Objection No. 16:** This statement lacks foundation and is impermissibly conclusory. The declaration does not state how he “learned” that other positions were classified as “exempt” or how he knew that other employees were not paid overtime, which is information entirely within his personal knowledge. See Fed. R. Evid. 602. The statements also are inadmissible hearsay. See Fed. R. Evid. 802. These are out of court statements purportedly made by other PC/LAN Engineer 3’s offered to prove the truth of the matter asserted, i.e., that other employees were classified as exempt and that they were not paid overtime.

**Ruling on Objection No. 16:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

**Objection No. 17:** Paragraph 6, p. 2, which states: “I knew of and had discussions with other PC/LAN Engineers 3 at Wells Fargo’s other locations, including Iowa, Maryland, and South Carolina. Based upon my training, experience, and discussions with other employees, I can attest that the work of PC/LAN Engineers 3 was functionally the same and did not vary significantly from location to location.”

**Grounds for Objection No. 17:** This statement lacks foundation and is impermissibly conclusory. See Fed. R. Evid. 602, 701. The statements also are inadmissible hearsay. See Fed. R. Evid. 802. These are out of court statements purportedly made by other PC/LAN Engineer 3’s offered to prove the truth of the matter asserted, i.e., that other employees performed the same duties as he performed.

**Ruling on Objection No. 17:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

**Objection No. 18:** Paragraph 7, p. 2, which states: “As a PC/LAN Engineer 3, the primary work I performed was highly structured and constrained by Wells Fargo’s predetermined instructions, specifications, policies, and procedures, and did not normally require the consistent exercise of discretion and independent judgment.”

**Grounds for Objection No. 18:** This statement lacks foundation and is impermissibly conclusory. The declaration provides legal conclusions without any specificity, which is

1 information entirely within his personal knowledge. See Fed. R. Evid. 602, 701.

2 **Ruling on Objection No. 18:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

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4 **Objection No. 19:** Paragraph 8, p. 2-3, which states: “During my time working for Wells  
5 Fargo, I came to know of other employees with position titles PC/LAN Engineer 3, 4, and  
6 5 located at Wells Fargo’s various locations in the United States. Based upon my training,  
7 experience, and discussions with other employees, I can attest that the work of PC/LAN  
8 Engineers 3, 4, and 5 was functionally the same and did not vary significantly from  
9 location to location. PC/LAN Engineers 4 and 5 had primary duties similar to the duties  
10 of a PC/LAN Engineer 3, as set forth above. The primary work of PC/LAN Engineers 4  
11 and 5 was also highly structured and constrained by Wells Fargo’s predetermined  
12 instructions, specifications, policies, and procedures, and did not normally require  
13 consistent exercise of discretion and independent judgment.”

14 **Grounds for Objection No. 19:** This statement lacks foundation and is impermissibly  
15 conclusory. The declaration does not state how he learned that individuals in other  
16 positions performed the same work as he performed, information entirely within his  
17 personal knowledge. Furthermore, the statement contains legal conclusions, without any  
18 specificity. See Fed. R. Evid. 602, 701. The statements also are inadmissible hearsay.  
19 See Fed. R. Evid. 802. These are out of court statements purportedly made by PC/LAN  
20 Engineer 4’s and 5’s offered to prove the truth of the matter asserted, i.e., that other  
21 employees performed the same work as he did in the same manner.

22 **Ruling on Objection No. 19:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

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24 **Objection No. 20:** Paragraph 9, p. 3, which states: “At no point in time during my  
25 employment with Wells Fargo did I have a clear understanding that I would be paid based  
26 on a so-called ‘fluctuating workweek’ method of calculating overtime compensation.”

27 **Grounds for Objection No. 20:** This statement is irrelevant and therefore inadmissible.  
28 See Fed. R. Evid. 402. It is irrelevant to the inquiry of whether the “fluctuating

workweek” method is the proper calculation of back pay to an allegedly misclassified employee whether the employee had an understanding that he would be compensated based on a “fluctuating workweek” calculation. See, e.g., Tumulty v. Fedex Ground Package Sys., Inc., 2005 WL 1979104, \*4 (W.D. Wash. Aug. 16, 2005) (“[t]he First and Fifth Circuits have both held that employers who inappropriately misclassified an employee as exempt from the FLSA may rely on § 778.114 [which allows the fluctuating workweek calculation] to determine overtime due because the employees understood that they would be paid a fixed weekly salary regardless of the hours worked”) (citing Valerio v. Putnam Assoc. Inc., 173 F.3d 35, 39-40 (1st. Cir. 1999) and Blackmon v. Brookshire Grocery Co., 835 F.2d 1135, 1138 (5th Cir. 1988)).

**Ruling on Objection No. 20:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

**E. Declaration of Daniel Friedman**

**Objection No. 21:** Paragraph 5, p. 1-2, which states: “During my tenure as a PC/LAN Engineer 4 in Wells Fargo’s Technology Information Group, I learned that Wells Fargo had classified my position and other similar Technology Information Group positions as ‘exempt’ from entitlement to overtime compensation. I knew many other employees who held the position title PC/LAN Engineer 4 during my employment with Wells Fargo and none of them were paid overtime during the time I was employed by Wells Fargo.”

**Grounds for Objection No. 21:** This statement lacks foundation and is impermissibly conclusory. The declaration does not state how he “learned” that other positions were classified as “exempt” or how he knew that other employees were not paid overtime, which is information entirely within his personal knowledge. See Fed. R. Evid. 602. The statements also are inadmissible hearsay. See Fed. R. Evid. 802. These are out of court statements purportedly made by other PC/LAN Engineer 4’s offered to prove the truth of the matter asserted, i.e., that other employees were classified as exempt and that they were not paid overtime.

1 **Ruling on Objection No. 21:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

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3 **Objection No. 22:** Paragraph 6, p. 2, which states: “I knew of and had discussions with  
4 other PC/LAN Engineers 4 at Wells Fargo’s other locations, including Colorado, Arizona,  
5 and Iowa. Based upon my training, experience, and discussions with other employees, I  
6 can attest that the primary work of PC/LAN Engineers 4 was functionally the same and  
7 did not vary significantly from location to location.”

8 **Grounds for Objection No. 22:** This statement lacks foundation and is impermissibly  
9 conclusory. See Fed. R. Evid. 602, 701. The statements also are inadmissible hearsay.  
10 See Fed. R. Evid. 802. These are out of court statements purportedly made by other  
11 PC/LAN Engineer 4’s offered to prove the truth of the matter asserted, i.e., that other  
12 employees performed the same duties as he performed.

13 **Ruling on Objection No. 22:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

14  
15 **Objection No. 23:** Paragraph 7, p. 2, which states: “As a PC/LAN Engineer 4, the  
16 primary work I performed was highly structured and constrained by Wells Fargo’s  
17 predetermined instructions, specifications, policies, and procedures, and did not normally  
18 require the consistent exercise of discretion and independent judgment.”

19 **Grounds for Objection No. 23:** This statement lacks foundation and is impermissibly  
20 conclusory. The declaration provides legal conclusions without any specificity, which is  
21 information entirely within his personal knowledge. See Fed. R. Evid. 602, 701.

22 **Ruling on Objection No. 23:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

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24 **Objection No. 24:** Paragraph 8, p. 2-3, which states: “During my employment with  
25 Wells Fargo, I came to know other employees with position titles PC/LAN Engineer 3, 4,  
26 and 5 located at Wells Fargo’s various locations in the United States. Based upon my  
27 training, experience, and discussions with other employees, I can attest that the work of  
28 PC/LAN Engineers 3, 4, and 5 was functionally the same and did not vary significantly

1 from location to location. PC/LAN Engineers 3 and 5 had primary duties similar to the  
 2 duties of a PC/LAN Engineer 4, as set forth above. The primary work of PC/LAN  
 3 Engineers 3 and 5 was also highly structured and constrained by Wells Fargo's  
 4 predetermined instructions, specifications, policies, and procedures, and did not normally  
 5 require consistent exercise of discretion and independent judgment."

6 **Grounds for Objection No. 24:** This statement lacks foundation and is impermissibly  
 7 conclusory. The declaration does not state how he learned that individuals in other  
 8 positions performed the same work as he performed, information entirely within his  
 9 personal knowledge. Furthermore, the statement contains legal conclusions, without any  
 10 specificity. See Fed. R. Evid. 602, 701. The statements also are inadmissible hearsay.  
 11 See Fed. R. Evid. 802. These are out of court statements purportedly made by PC/LAN  
 12 Engineer 3's and 5's offered to prove the truth of the matter asserted, i.e., that other  
 13 employees performed the same work as he did in the same manner.

14 **Ruling on Objection No. 24:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_  
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16 **Objection No. 25:** Paragraph 9, p. 3, which states: "At no point in time during my  
 17 employment with Wells Fargo did I have a clear understanding that I would be paid based  
 18 on a so-called 'fluctuating workweek' method of calculating overtime compensation."

19 **Grounds for Objection No. 25:** This statement is irrelevant and therefore inadmissible.  
 20 See Fed. R. Evid. 402. It is irrelevant to the inquiry of whether the "fluctuating  
 21 workweek" method is the proper calculation of back pay to an allegedly misclassified  
 22 employee whether the employee had an understanding that he would be compensated  
 23 based on a "fluctuating workweek" calculation. See, e.g., Tumulty v. Fedex Ground  
 24 Package Sys., Inc., 2005 WL 1979104, \*4 (W.D. Wash. Aug. 16, 2005) ("[t]he First and  
 25 Fifth Circuits have both held that employers who inappropriately misclassified an  
 26 employee as exempt from the FLSA may rely on § 778.114 [which allows the fluctuating  
 27 workweek calculation] to determine overtime due because the employees understood that  
 28 they would be paid a fixed weekly salary regardless of the hours worked") (citing Valerio



1 v. Putnam Assoc. Inc., 173 F.3d 35, 39-40 (1st. Cir. 1999) and Blackmon v. Brookshire  
 2 Grocery Co., 835 F.2d 1135, 1138 (5th Cir. 1988)).

3 **Ruling on Objection No. 25:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

4  
 5 **Objection No. 26:** Paragraph 11, p. 3, which states: “In approximately August 2007,  
 6 after I had already left Wells Fargo, I learned from a former co-worker that Wells Fargo  
 7 had paid back wages to certain PC/LAN Engineers.”

8 **Grounds for Objection No. 26:** This statement lacks foundation and is impermissibly  
 9 conclusory. The declaration does not state how he “learned” that Wells Fargo had paid  
 10 back wages to certain employees, which is information entirely within his personal  
 11 knowledge. See Fed. R. Evid. 602. The statements also are inadmissible hearsay. See  
 12 Fed. R. Evid. 802. These are out of court statements offered to prove the truth of the  
 13 matter asserted, i.e., that Wells Fargo paid back wages to certain PC/LAN Engineers.

14 **Ruling on Objection No. 26:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

15  
 16 **Objection No. 27:** Paragraph 13, p. 3-4, which states: “Towards the end of August 2007,  
 17 Ms. Antes Sivertson sent me materials relating to my inquiry about back wages/payments.  
 18 The materials included a survey and a purported calculation of the back wages owed to  
 19 me by Wells Fargo resulting from its misclassification of the PC/LAN Engineer position  
 20 as ‘exempt’ from overtime pay requirements.”

21 **Grounds for Objection No. 27:** The statements are inadmissible hearsay. See Fed. R.  
 22 Evid. 802. These are out of court statements offered to prove the truth of the matter  
 23 asserted. Furthermore, “[t]o prove the content of a writing,...the original writing...is  
 24 required.” See Fed. R. Evid. 1002.

25 **Ruling on Objection No. 27:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

1           **F. Declaration of Greg Diersing**

2  
3       **Objection No. 28:** Paragraph 4, p. 1-2, which states: “When I returned to work for Wells  
4 Fargo in November 2007 as a PC/LAN Engineer 3, I learned that Wells Fargo had re-  
5 classified the PC/LAN Engineer 3 position as ‘nonexempt,’ and paid PC/LAN Engineers  
6 an hourly wage and overtime at a rate of 1.5 times the hourly wage.”

7       **Grounds for Objection No. 28:** This statement lacks foundation and is impermissibly  
8 conclusory. The declaration does not state how he “learned” that Wells Fargo had re-  
9 classified the PC/LAN Engineer 3 position as non-exempt or how he knew how PC/LAN  
10 Engineers were paid, which is information entirely within his personal knowledge. See  
11 Fed. R. Evid. 602. The statements also are inadmissible hearsay. See Fed. R. Evid. 802.  
12 These are out of court statements offered to prove the truth of the matter asserted, i.e., that  
13 Wells Fargo re-classified the position of PC/LAN Engineer 3 to non-exempt and paid  
14 them hourly and overtime at a rate of 1.5 times the hourly rate.

15       **Ruling on Objection No. 28:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

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17       **Objection No. 29:** Paragraph 5, p. 2, which states: “During my first period of  
18 employment as a PC/LAN Engineer 3 in Wells Fargo’s Technology Information Group, I  
19 learned that Wells Fargo had classified my position and similar Technology Information  
20 Group positions as ‘exempt’ from entitlement to overtime compensation. During this  
21 time, I came to know several other employees who held the position title PC/LAN  
22 Engineer 3 and none of them were paid overtime as PC/LAN Engineers 3.”

23       **Grounds for Objection No. 29:** This statement lacks foundation and is impermissibly  
24 conclusory. The declaration does not state how he “learned” that other positions were  
25 classified as “exempt” or how he knew that other employees were not paid overtime,  
26 which is information entirely within his personal knowledge. See Fed. R. Evid. 602. The  
27 statements also are inadmissible hearsay. See Fed. R. Evid. 802. These are out of court  
28 statements purportedly made by other PC/LAN Engineer 3’s offered to prove the truth of

1 the matter asserted, i.e., that other employees were classified as exempt and that they were  
2 not paid overtime.

3 **Ruling on Objection No. 29:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

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5 **Objection No. 30:** Paragraph 6, p. 2, which states: “During my first period of  
6 employment as a PC/LAN Engineer 3, I knew of and had discussions with other PC/LAN  
7 Engineers 3 at Wells Fargo’s other locations, including West Virginia, Minnesota, and  
8 California. Based upon my training, experience, and discussions with other employees, I  
9 can attest that the work of PC/LAN Engineers 3 is, has been, and continues to be  
10 functionally the same and did not vary significantly from location to location.”

11 **Grounds for Objection No. 30:** This statement lacks foundation and is impermissibly  
12 conclusory. See Fed. R. Evid. 602, 701. The statements also are inadmissible hearsay.  
13 See Fed. R. Evid. 802. These are out of court statements purportedly made by other  
14 PC/LAN Engineer 3’s offered to prove the truth of the matter asserted, i.e., that other  
15 employees performed the same duties as he performed.

16 **Ruling on Objection No. 30:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

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18 **Objection No. 31:** Paragraph 7, p. 3, which states: “As a PC/LAN Engineer 3, the  
19 primary work I perform has been, and continues to be highly structured and constrained  
20 by Wells Fargo’s predetermined instructions, specifications, policies, and procedures, and  
21 did not normally require the consistent exercise of discretion and independent judgment.”

22 **Grounds for Objection No. 31:** This statement lacks foundation and is impermissibly  
23 conclusory. The declaration provides legal conclusions without any specificity, which is  
24 information entirely within his personal knowledge. See Fed. R. Evid. 602, 701.

25 **Ruling on Objection No. 31:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

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27 **Objection No. 32:** Paragraph 8, p. 3, which states: “At no point in time during my  
28 employment with Wells Fargo did I have a clear understanding that I would be paid based

1 on a so-called ‘fluctuating workweek’ method of calculating overtime compensation.”

2 **Grounds for Objection No. 32:** This statement is irrelevant and therefore inadmissible.

3 See Fed. R. Evid. 402. It is irrelevant to the inquiry of whether the “fluctuating  
4 workweek” method is the proper calculation of back pay to an allegedly misclassified  
5 employee whether the employee had an understanding that he would be compensated  
6 based on a “fluctuating workweek” calculation. See, e.g., Tumulty v. Fedex Ground  
7 Package Sys., Inc., 2005 WL 1979104, \*4 (W.D. Wash. Aug. 16, 2005) (“[t]he First and  
8 Fifth Circuits have both held that employers who inappropriately misclassified an  
9 employee as exempt from the FLSA may rely on § 778.114 [which allows the fluctuating  
10 workweek calculation] to determine overtime due because the employees understood that  
11 they would be paid a fixed weekly salary regardless of the hours worked”) (citing Valerio  
12 v. Putnam Assoc. Inc., 173 F.3d 35, 39-40 (1st. Cir. 1999) and Blackmon v. Brookshire  
13 Grocery Co., 835 F.2d 1135, 1138 (5th Cir. 1988)).

14 **Ruling on Objection No. 32:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

15  
16 **Objection No. 33:** Paragraph 12, p. 3-4, which states: “Since my second period of  
17 employment as a PC/LAN Engineer 3, I have learned from discussions with other  
18 PC/LAN Engineers and Technology Information Group employees that certain PC/LAN  
19 Engineers received from Wells Fargo some sort of backpay payment for unpaid  
20 overtime.”

21 **Grounds for Objection No. 33:** The statements are inadmissible hearsay. See Fed. R.  
22 Evid. 802. These are out of court statements purportedly made by other employees  
23 offered to prove the truth of the matter asserted, i.e., that Wells Fargo paid back pay to  
24 other employees.

25 **Ruling on Objection No. 33:** Sustained \_\_\_\_\_ Overruled \_\_\_\_\_

1 Wells Fargo respectfully requests that the Court sustain the foregoing  
2 objections at the hearing on the Motion and strike the evidence referred to above.  
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4  
5 DATED: August 14, 2008

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